86-151

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1986

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

DONALD CALVIN MATTISON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI—CRIMINAL CASE

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27pp

Question Presented for Review.

The question presented for review is whether a defendant, whose retained attorney has a potential conflict of interest, is denied his right to effective assistance of counsel absent a finding that an actual conflict of interest adversely affected his lawyer's performance. The defendant's retained attorney was an associate of a law firm in which a partner represented an accomplice of the defendant who testified against the defendant pursuant to a plea bargain which resulted in a more favorable sentence for said accomplice. The New York State Court of Appeals ruled that the existence of such a conflict constituted a denial of the defendant's right to effective assistance of counsel without a finding that the existence of such a conflict adversely affected the lawyer's performance. The People contend that the existence of a conflict, standing alone, is "insufficient to impugn a criminal conviction. In order to demonstrate a violation of the Sixth Amendment rights, a defendant must establish that an actual conflict of interest *adversely affected his lawyer's performance.*" (*emphasis added*). *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980). The People contend that the New York State Court of Appeals erred in utilizing an inferential approach in determining whether respondent's right to effective assistance of counsel had been violated. While the awkward position of defense counsel may arouse suspicion as to his ability to provide effective assistance, the true test should be whether or not, in fact, a true adversarial criminal trial has been conducted. *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Table of Contents.

	Page
Question Presented for Review	i
Table of Cases and Authorities Cited	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Argument	7

Index to Appendix.

Appendix A—Decision of Chemung County Court, Dated October 28, 1983	1a
Appendix B—Decision of the Appellate Division, Third Department, Dated April 18, 1985	1b
Appendix C—Opinion of the New York State Court of Appeals, Decided June 5, 1986	1c

TABLE OF CASES AND AUTHORITIES CITED.

Page

TABLE OF CASES:

Abrahams v. United States, 548 F.2d 236 (2nd Cir. 1977) 6

Cuyler v. Sullivan, 446 U.S. 335 (1980) ..... i, 7

Goitia v. United States, 335 F. Sup. 1044 (D.C.N.Y. 1971) 6

Olshen v. McMann, 378 F.2d 993 (2nd Cir. 1967), cert. denied 398 U.S. 874, rehearing denied 389 U.S. 964 (1967) 5

People v. Alicea, 61 NY2d 23 (1983) 7

People v. Gomberg, 38 NY2d 307 (1975) 4, 7

People v. Hunt, 31 AD2d 846 (3rd Dept. 1969) 6

People v. Lombardo, 61 NY2d 97 (1984) 7

People v. Macerola, 47 NY2d 257 (1979) 5

People v. Olshen, 30 Misc.2d 1078 (Co. Ct. Kings 1961), aff'd. 17 AD2d 971 (2nd Dept. 1963), cert. denied 374 U.S. 846 (1963) 5

People v. Pelio, 24 AD2d 500 (2nd Dept. 1965) 6

People v. Richetti, 302 NY 290 (1951) 6

Page

United States v. Bynum, 485 F.2d 490 (2nd Cir. 1973), vacated on other grounds 417 U.S. 903, conformed to 386 F. Supp. 449, aff'd. 513 F.2d 533, cert. denied 423 U.S. 952..... 6

United States v. Cronic, 466 U.S. 648 (1984)..... i, 8

United States v. Keogh, 391 F.2d 138 (2nd Cir. 1968) 6

United States v. Mari, 526 F.2d 117 (2nd Cir. 1975). 6

STATUTE:

28 USC §1257(3)..... 1

IN THE

SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

DONALD CALVIN MATTISON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR CERTIORARI.

Opinion Below.

The opinion of the New York State Court of Appeals rendered June 5, 1986, is reported at 67 NY2d 462.

Jurisdiction.

The judgment of the court below was entered on June 5, 1986. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 USC §1257(3).

Constitutional Provision Involved.

The Sixth Amendment, United States Constitution, which provides, *inter alia,* that in all criminal prosecutions the accused shall have the assistance of counsel for his defense.

Statement of the Case.

On November 10, 1977, Donald Mattison and Dennis Maggese were indicted on charges of robbery in the first degree. Dennis Maggese was already under indictment on unrelated burglary and drug charges and represented by Joseph Balok in his capacity as an assistant public defender. Balok was also a partner in the law firm of Miller and Balok. Donald Mattison was represented on the robbery charge by Raymond Urbanski, who was associated with the firm of Miller and Balok. The trial court assigned James Carmody to represent Dennis Maggese in place of the public defender's office on the robbery charge. With Balok and Carmody coordinating plea negotiations, Dennis Maggese pled guilty to several charges, including the robbery, and agreed to testify against his co-defendants in exchange for a sentence of five years. Attorney Urbanski went on to represent Mattison at trial on the robbery charge. Dennis Maggese testified against Mattison at that trial. On September 28, 1978, the defendant was found guilty as charged. On October 5, 1978, the defendant was sentenced to seven to twenty-one years. At no time prior to the entry of judgment was there any inquiry, on the record, concerning any potential conflict that Mattison's retained attorney might have. On November 14, 1978, the Appellate Division assigned Attorney Urbanski to represent Mattison on appeal. Ineffective assistance of counsel was not raised on

appeal. Mattison's judgment of conviction was, in all respects, affirmed on direct appeal. In 1983, Mattison brought a motion to vacate his conviction upon several grounds, including a denial of effective assistance of counsel because his retained counsel had a conflict of interest. The trial court denied the motion to vacate, finding that no conflict existed and that Attorney Urbanski conducted a competent, effective and independent defense. The intermediate appellate court affirmed the hearing court's decision, without opinion. The New York State Court of Appeals reversed on the basis that, "absent inquiry by the court and consent by the defendant, an attorney may not represent a criminal defendant in a trial at which a star prosecution witness is a co-defendant whose plea bargain—including the promise to testify against the defendant—was negotiated by a partner in the same firm. In these circumstances, the defendant is denied his right to effective assistance of counsel." Opinion of the court below. Upon these facts, the New York State Court of Appeals presumed prejudice to the defendant rather than requiring the defendant to establish that an actual conflict of interest adversely affected his lawyer's performance. The questions sought to be reviewed were first raised in the nature of *coram nobis* in the Chemung County Court, State of New York, which resulted in the decision of Chemung County Court Judge William A. Danaher, Jr., dated October 28, 1983. A federal question sought to be reviewed was passed upon by the court of first instance in the following manner.

> "3. In the matter of the alleged ineffective assistance of counsel, the Court finds that no conflict existed, that the defense was competently conducted and that the defendant, in retaining Mr. Ur-

banski as counsel on appeal, has waived any claim to ineffective assistance of counsel.

It must be emphasized that this is not a case of multiple defendants being represented by the same attorney. The facts have shown that Mr. Mattison was represented by a member of the law firm who, in his capacity as an assistant public defender, represented a prosecution witness on prior unrelated charges. The cases cited by the defendant relate to cases in which there was a clear conflict, one attorney representing multiple defendants. The Court does not believe these cases capable of being stretched to fit defendant's situation.

The defendant knew at least as early as during the trial that Mr. Balok was a partner of the firm with which Mr. Urbanski was associated, and had represented Mr. Maggese on unrelated charges in his position as an assistant public defender. He apparently discussed this matter with Mr. Urbanski and resolved it to his satisfaction. No objection was made to the trial court by Mr. Mattison, nor did he bring the subject up again to Mr. Urbanski until, following his direct appeal, he faced his sentence with the State Corrections Department. The Court, in *People v. Gomberg,* 38 NY2d 307 (1975), found that the defendant, by retaining the same firm to represent him on appeal, was 'deemed to have waived any claims arising out of (the attorney's) prior representation.' *Id.* at 316. This Court believes, as did the *Gomberg* court, that the defendant could not have been seriously troubled by the effectiveness of counsel's representation when, knowing the facts, he retained the same counsel for appeal. If the defendant was concerned with this issue he would have retained new counsel and rais-

ed the issue on direct appeal. As the Court has previously stated, the *coram nobis* application was not meant to create an additional avenue of appeal when the defendant had the opportunity to bring the issue up on direct appeal.

The alleged conflict of interest we are dealing with was not apparent on the face of the record below. This is undoubtedly why there was no inquiry by the trial court as to defendant's understanding and waiver of any possible conflict. The failure to inquire is error if there is 'significant possibility' of a conflict of interest. *People v. Macerola,* 47 NY2d 257 (1979). The trial court was not faced with any such significant possibility and was thus not required to conduct an inquiry. *Olshen v. McMann,* 378 F.2d 993 (2nd Cir. 1967); *cert. den.,* 389 U.S. 874, *reh. den.,* 389 U.S. 964 (1967). However, while the trial court was not aware of the underlying facts, the defendant was aware of them and presented no objection during trial or on appeal.

Faced with very similar circumstances, if not facts more favorable to the defendant, the court, in *People v. Olshen,* 30 Misc.2d 1078 (C. Ct., Kings, 1961), *aff'd.* 17 AD2d 971 (2nd Dept. 1963), *cert. den.,* 374 U.S. 846 (1963), found that no conflict of interest existed and that the defendant had not been prejudiced. The court denied the petitioner's *coram nobis* application. Petitioner in that case had been represented by the same counsel who had represented the prosecution's prime witness on two prior charges. This matter was reviewed on a federal habeas corpus proceeding with the same result. *Olshen v. McMann, supra.* In the case at bar, the possibility of conflict is even more remote

than in *Olshen* since here, two separate attorneys were involved.

The Court in *U.S. v. Bynum,* 485 F. 2d 490 (2nd Cir. 1973), *vacated on other grounds,* 417 U.S. 903, conformed to 386 F. Supp. 449, *aff'd.,* 513 F. 2d 533, *cert. den.* 423 U.S. 952, also found no conflict where the defense attorney had represented a prosecution witness on previous unrelated charges.

Based upon these cases, the testimony received by this Court and the record below, the Court finds no actual conflict of interest existed nor was there any prejudice suffered by the defendant in this respect. Mr. Urbanski provided the defendant with very competent, effective and independent legal assistance. This is born out in the record below and in particular, by Mr. Urbanski's cross-examination of Mr. Maggese. The petitioner has failed to show that any real conflict of interest existed and thus his allegation must be dismissed. *U.S. v. Mari,* 526 F. 2d 117 (2nd Cir. 1975), *cert. den.,* 429 U.S. 941; *Abrahams v. U.S.,* 549 F.2d 236 (2nd Cir. 1977) (both joint representation cases).

Coram nobis relief should be granted only under circumstances compelling such action to achieve justice. *U.S. v. Keogh,* 391 F.2d 138 (2nd Cir. 1968); *Goitia v. U.S.,* 335 F. Supp. 1044 (D.C.N.Y. 1971). Viewing the petitioner's contentions and evidence, the Court is not convinced justice requires such relief.

The petitioner has not met his burden of proof and his application for relief under Section 440.10 of the Criminal Procedure Law is denied. *People v. Hunt,* 31 AD2d 846 (3rd Dept. 1969); *People v. Pelio,* 24 AD2d 500 (2nd Dept. 1965); *People v. Richetti,* 302 N.Y. 290 (1951)."

The decision of the New York State Court of Appeals was rendered without a plain statement that the decision rested upon adequate and independent State grounds. While the decision cites only prior New York State decisions throughout its opinion, each of those prior cases relied upon by the New York State Court of Appeals were decided primarily upon consideration of federal constitutional and decisional law. The three primary cases relied upon by the New York State Court of Appeals were *People v. Gomberg, supra; People v. Lombardo,* 61 N.Y.2d 97 (1984), and *People v. Alicea,* 61 N.Y.2d 23 (1983). As can be seen by an examination of those opinions, the New York State Court of Appeals relied heavily on the United States Constitution, prior federal decisional case law and American Bar Association code of professional responsibility. Indeed, in *People v. Alicea, supra,* the New York State Court of Appeals relied on *Cuyler v. Sullivan, supra,* in reaching its decision.

Argument.

In the case at bar, it is the *People's* contention that the New York State Court of Appeals has decided a federal question in a way which is in conflict with the applicable decisions of this Court. The *People* contend that the New York State Court of Appeals did not apply the appropriate standard announced in *Cuyler v. Sullivan, supra,* in that the New York State Court of Appeals did not require a showing that an actual conflict of interest adversely affected the defense lawyer's performance and did not ex-

amine whether a true adversarial criminal trial had been conducted on defendant's behalf. *United States v. Cronic, supra.*

Respectfully submitted,

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Appendix A—Decision of Chemung County Court, Dated October 28, 1983.

STATE OF NEW YORK,

COUNTY COURT, COUNTY OF CHEMUNG.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

against

DONALD CALVIN MATTISON,

Defendant.

Appearances:

Weeden Wetmore, Esquire, Assistant District Attorney, for the People, Lake Street, Elmira, New York 14901.

John R. McGlenn, Esquire, Attorney for the Defendant, 100 Baldwin Street, Elmira, New York 14901.

Before:

Hon. William A. Danaher, Jr., Chemung County Judge.

DANAHER, J.:

The defendant is before the Court on a motion, under Section 440.10 Criminal Procedure Law, to vacate the judgment of conviction entered against him on October 5, 1978. Following a review of the defendant's *pro se* motion, the Court scheduled a hearing and appointed counsel to represent the defendant. Hearings were held on August 19, August 23 and September 1, 1983. It is defendant's contention in his motion papers, in the hearing and in the comprehensive brief submitted by his attorney that (1) he was denied effective assistance of counsel at his trial, (2) the trial court erred in respect to its charge on the issue of intent, and (3) exculpatory material in the hands of the District Attorney was not provided to the defendant.

Having reviewed the papers and the testimony at the hearing, the Court makes the following Findings of Fact:

1. The defendant was indicted by the Chemung County Grand Jury on November 10, 1977, indictment number 77-280, on the charge of robbery in the first degree for the armed robbery of a gas station in Chemung, New York.

2. Dennis Maggese was indicted on the same charge for the same robbery under indictment number 77-279.

3. Defendant was represented on indictment number 77-280 by Raymond Urbanski, Esq., who was associated with the law firm of Miller and Balok. As a co-defendant, Mr. Maggese was represented at his arraignment on November 16, 1977 by Samuel J. Castellino, Esq., Chemung County Public Defender. The court relieved the Public Defender's office of its representation of Mr. Maggese the day after his arraignment. James Carmody, Es-

quire, was assigned to represent Mr. Maggese on the robbery charge from that point.

4. Mr. Maggese had previously been charged with four separate crimes under indictments numbered 77-17 and 77-251 which were pending in November 1977. Joseph Balok, Esq., an Assistant Chemung County Public Defender, was representing Mr. Maggese on the charges under indictments numbered 77-17 and 77-251.

5. Mr. Balok was an Assistant Chemung County Public Defender and a partner in the firm of Miller and Balok in 1977 and 1978.

6. Mr. Urbanski was responsible for conducting Mr. Mattison's defense under indictment number 77-280 and he did so independently. Mr. Mattison's testimony that Mr. Miller and Mr. Balok represented him through most of his pretrial hearings in the case was controverted by the testimony of Mr. Urbanski and Mr. Balok.

7. Through his attorneys, Mr. Balok and Mr. Carmody, Mr. Maggese entered into plea negotiations on charges pending against him under indictments numbered 77-17, 77-251 and 77-279. Mr. Balok was the spokesman in court appearances. However, each attorney negotiated for and represented Maggese solely for the charge or charges under the indictment for which the attorney had been assigned.

8. On January 4, 1978, Mr. Maggese pled guilty to certain charges under indictments numbered 77-17, 77-251 and 77-279. The plea bargain called for Mr. Maggese to testify against any co-defendants.

9. Mr. Mattison went to trial on September 18, 1978 on indictment number 77-280. Mr. Maggese testified against Mr. Mattison at the trial.

10. Mr. Balok informed Mr. Urbanski of his representation of Mr. Maggese and of a possible conflict. This apparently took place during or after the Maggese plea negotiations. Part of Mr. Balok's notice to Mr. Urbanski was to inform him of Mr. Maggese's plea agreement to testify against Mr. Mattison.

11. Mr. Mattison was on actual notice of Mr. Balok's representation at least as early as during his trial. The testimony showed that he became upset when he saw Mr. Balok in the back of the courtroom speaking to Investigator Freeman. Mr. Urbanski testified that he was concerned about Mr. Balok's representation of Mr. Maggese. Mr. Mattison and Mr. Urbanski discussed these concerns and apparently resolved them.

12. Though aware of Mr. Balok's representation of Mr. Maggese on earlier charges and aware that Mr. Balok and Mr. Urbanski were associated with the same law firm, Mr. Mattison did not object to Mr. Urbanski's continued representation during trial or on appeal.

13. The trial judge did not inform Mr. Mattison of any possible conflict of interest.

14. The alleged conflict of interest was not brought up on appeal even though the defendant was aware of the circumstances at the time of appeal.

15. No exception was taken to the judge's jury charge on intent at trial, nor was the alleged error brought up on appeal.

16. The defendant has not produced evidence to show prosecutorial misconduct in the withholding of exculpatory material. Mr. Crew testified that he went through his trial material before the date of trial and turned over material to Mr. Urbanski. The defendant did not raise the issue of prosecutorial misconduct on appeal.

17. The record of defendant's trial shows that the defense was aware of tests made to the pistol involved in the case (Record, P. 7). Defendant was to receive a copy of the test report from the District Attorney and Mr. Urbanski's testimony reflects that the results of such weapon tests were made available to him verbally if not in writing. The weapon test was in fact not exculpatory.

18. The statements of Mr. Maggese to police were made available to the defense.

19. No promises or threats were made to Shelly Houghtaling in return for her testimony.

20. Defendant Mattison made a sworn statement to the prosecution, with his counsel present and following his conviction, in which he fully admitted the crime, giving details thereof.

21. The record of the defendant's trial shows that Mr. Urbanski comprehensively prepared his defense and vigorously represented his client.

The Court makes the following Conclusions of Law:

1. Petitioner cannot collaterally attack his judgment of conviction by *coram nobis* application due to an alleged error in the jury charge. *People v. Bell,* 31 Misc. 2d 814

(Gen. Sess. N.Y. County 1961), *aff'd.*, 16 A.D. 2d 624 (1st Dept. 1962), *cert. den.*, 371 U.S. 872; *U.S. ex rel Kulikauskas v. Murphy,* 293 F. 2d 563 (2nd Cir. 1961). The alleged error was apparent on the face of the record but was not objected to either at the trial or on appeal. The petitioner's post-judgment motion cannot be used as an additional appeal for matters apparent on the face of the trial record. *People v. Cunningham,* 104 Misc. 2d 298 (S. Ct. Bronx 1980); Section 440.10 (2) (c) Criminal Procedure Law. The *Cunningham* court noted that its result remained unchanged by the decision in *Sandstrom v. Montana* 442 U.S. 510 (1979), since that decision did not substantively alter New York law. *Cunningham, supra,* at 303-304. The nature of the alleged error does not affect the inability of the defendant to use a *coram nobis* proceeding as another avenue of appeal beyond direct appeal. *People v. Howard,* 12 N.Y. 2d 65, 67 (1967); *People v. Peterson,* 33 Misc. 2d 861, 863 (C. Ct. Kings 1962), *aff'd.*, 18 A.D. 2d 1054 (2nd Dept. 1963).

2. The defendant has failed to meet his burden of establishing prejudice due to prosecutorial misconduct. The evidence does not support the defendant's contentions of prosecutorial misconduct in the withholding of evidence from the defense or in making secret deals with prosecution witnesses in exchange for their testimony.

a. The test report on the pistol involved in the robbery was made available to the defense either in written or oral form. This report was in fact not exculpatory and the defendant was not prejudiced by the timing of its release or the form of its release since the defense was in fact aware of the contents of the report. See *U.S. v. Keogh,* 316 F. Supp 921 (D.C.N.Y. 1970), *aff'd.*, 440 F. 2d 737, *cert. den.*, 404 U.S. 941.

b. Based upon the testimony of Mr. Crew and the record at trial relative to material turned over to the defense by the District Attorney, the Court is satisfied that the statement of Mr. Maggese to police, Exhibit "8", was turned over to the defense. The Court is also satisfied that Exhibit "9" was made available to the defense.

c. Mr. Urbanski was aware of Mr. Maggese's plea negotiation and of its requirement that Maggese testify against Mr. Mattison. While Mr. Urbanski did not specifically refer to the plea negotiation as such on cross-examination, he did make use of the effect of that negotiation, Maggese's reduced sentence, to impeach the witness's credibility.

3. In the matter of the alleged ineffective assistance of counsel, the Court finds that no conflict existed, that the defense was competently conducted and that the defendant, in retaining Mr. Urbanski as counsel on appeal, has waived any claim to ineffective assistance of counsel.

It must be emphasized that this is not a case of multiple defendants being represented by the same attorney. The facts have shown that Mr. Mattison was represented by a member of the law firm who, in his capacity as an assistant public defender, represented a prosecution witness on prior unrelated charges. The cases cited by the defendant relate to cases in which there was a clear conflict, one attorney representing multiple defendants. The Court does not believe these cases capable of being stretched to fit defendant's situation.

The defendant knew at least as early as during the trial that Mr. Balok was a partner of the firm with which Mr. Urbanski was associated, and had represented Mr. Maggese on unrelated charges in his position as an assistant

public defender. He apparently discussed this matter with Mr. Urbanski and resolved it to his satisfaction. No objection was made to the trial court by Mr. Mattison, nor did he bring the subject up again to Mr. Urbanski until, following his direct appeal, he faced his sentence with the State Corrections Department. The Court, in *People v. Gomberg,* 38 N.Y. 2d 307 (1975), found that the defendant, by retaining the same firm to represent him on appeal, was "deemed to have waived any claims arising out of (the attorney's) prior representation." *Id.* at 316. This Court believes, as did the *Gomberg* court, that the defendant could not have been seriously troubled by the effectiveness of counsel's representation when, knowing the facts, he retained the same counsel for appeal. If the defendant was concerned with this issue he would have retained new counsel and raised the issue on direct appeal. As the Court has previously stated, the *coram nobis* application was not meant to create an additional avenue of appeal when the defendant had the opportunity to bring the issue up on direct appeal.

The alleged conflict of interest we are dealing with was not apparent on the face of the record below. This is undoubtedly why there was no inquiry by the trial court as to defendant's understanding and waiver of any possible conflict. The failure to inquire is error if there is "significant possibility" of a conflict of interest. *People v. Macerola,* 47 N.Y. 2d 257 (1979). The trial court was not faced with any such significant possibility and was thus not required to conduct an inquiry. *Olshen v. McMann,* 378 F.2d 993 (2nd Cir. 1967); *cert. den.,* 389 U.S. 874, *reh. den.,* 389 U.S. 964 (1967). However, while the trial court was not aware of the underlying facts, the defendant was aware of them and presented no objection during trial or on appeal.

Faced with very similar circumstances, if not facts more favorable to the defendant, the court, in *People v. Olshen,* 30 Misc. 2d 1078 (C. Ct., Kings, 1961), *aff'd.*, 17 A.D.2nd 971 (2nd Dept. 1963), *cert. den.*, 374 U.S. 846 (1963), found that no conflict of interest existed and that the defendant had not been prejudiced. The court denied the petitioner's *coram nobis* application. Petitioner in that case had been represented by the same counsel who had represented the prosecution's prime witness on two prior charges. This matter was reviewed on a federal habeas corpus proceeding with the same result. *Olshen v. McMann, supra.* In the case at bar, the possibility of conflict is even more remote than in *Olshen* since here, two separate attorneys were involved.

The Court in *U.S. v. Bynum,* 485 F. 2d 490 (2nd Cir. 1973), *vacated on other grounds,* 417 U.S. 903, conformed to 386 F. Supp. 449, *aff'd.*, 513 F. 2d 533, *cert. den.*, 423 U.S. 952, also found no conflict where the defense attorney had represented a prosecution witness on previous unrelated charges.

Based upon these cases, the testimony received by this Court and the record below, the Court finds no actual conflict of interest existed nor was there any prejudice suffered by the defendant in this respect. Mr. Urbanski provided the defendant with very competent, effective and independent legal assistance. This is born out in the record below and in particular, by Mr. Urbanski's cross-examination of Mr. Maggese. The petitioner has failed to show that any real conflict of interest existed and thus his allegation must be dismissed. *U.S. v. Mari,* 526 F. 2d 117 (2nd Cir. 1975), *cert. den.*, 429 U.S. 941; *Abrahams v. U.S.*, 549 F. 2d 236 (2nd Cir. 1977) (both joint representation cases).

Coram nobis relief should be granted only under circumstances compelling such action to achieve justice. *U.S.*

v. Keogh, 391 F. 2d 138 (2nd Cir. 1968); *Goitia v. U.S.,* 335 F. Supp. 1044 (D.C.N.Y. 1971). Viewing the petitioner's contentions and evidence, the Court is not convinced justice requires such relief.

The petitioner has not met his burden of proof and his application for relief under Section 440.10 of the Criminal Procedure Law is denied. *People v. Hunt,* 31 A.D. 2d 846 (3rd Dept. 1969); *People v. Pelio,* 24 A.D. 2d 500 (2nd Dept. 1965); *People v. Richetti,* 302 N.Y. 290 (1951).

Appeal dismissed.

WILLIAM A. DANAHER, JR.
Chemung County Judge

Dated: October 28, 1983

Appendix B—Decision of the Appellate Division, Third Department, Dated April 18, 1985.

April 18, 1985 46830

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

DONALD CALVIN MATTISON,

Appellant.

Appeal, by permission, from an order of the County Court of Chemung County (Danaher, Jr., J.), entered November 16, 1983, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him of the crime of robbery in the first degree, after a hearing.

Order affirmed. No opinion.

MAHONEY, P.J., CASEY, WEISS and LEVINE, JJ., concur.

Appendix C—Opinion of the New York State Court of Appeals, Decided June 5, 1986.

COURT OF APPEALS,

STATE OF NEW YORK.

3 No. 182

THE PEOPLE &c.,

Respondent,

v.

DONALD CALVIN MATTISON,

Appellant.

(182) Cynthia S. Hutchinson, Elmira, for appellant.
James T. Hayden, DA, Chemung County (Weeden A. Wetmore of counsel) for respondent.

KAYE, J.:

Absent inquiry by the court and consent by the defendant, an attorney may not respresent a criminal defendant in a trial at which a star prosecution witness is a codefendant whose plea bargain—including the promise to testify against defendant—was negotiated by a partner in the

same firm. In these circumstances defendant is denied his right to effective assistance of counsel.

The following factual recital is derived from the undisturbed findings made after a hearing held pursuant to CPL 440, as well as the hearing and trial records.

Defendant, Donald Mattison, was indicted on November 10, 1977, together with Dennis Maggese, on charges of robbery in the first degree. Maggese was already under indictment on unrelated burglary and drug charges, and was represented by Joseph Balok, in his capacity as an assistant public defender. Balok was also a partner in the firm of Miller & Balok. Mattison was represented on the robbery charge by Raymond Urbanski, who was associated with the firm of Miller & Balok, and was recently admitted to the Bar.[1]

After Maggese's arraignment, the court assigned James Carmody to represent Maggese in place of the public defender's office on the robbery charge. Thereafter, Balok and Carmody coordinated plea negotiations on Maggese's behalf to dispose of all pending charges, with Balok as the spokesman in court appearances. On January 4, 1978, Maggese, facing up to 42 years imprisonment, pleaded guilty to some charges under each indictment as part of a plea bargain pursuant to which he agreed to testify against his co-defendants in exchange for a prison sentence of zero to five years. During the plea hearing, Balok asked that

[1]The court in its findings after the 440 hearing did not refer to the testimony of Mattison, his mother, father and sister, to the effect that their initial discussions regarding representation, and payment of a retainer, were with Balok, and also with Miller. Balok himself testified that the firm file "reflects that [Mattison] retained the firm in November 1977," and that while he was without specific recollection, he "might have met with [Mattison] in connection with the indictment that was pending against him or other matters," and "took no notes whatsoever during any interviews [he] may have had with [Mattison] or members of the family either in connection with this particular indictment or any other matters." Miller did not testify.

the record reflect that in his presence Maggese had discussed with the assistant district attorney "his involvement and the involvement of [Mattison] on the robbery charge." Maggese was then placed under oath and testified about the robbery, claiming that Mattison had obtained the gun and planned, organized and participated in the crime.

As the hearing court found, Urbanski conducted his defense of Mattison without any help from Balok. During or after Maggese's plea negotiations Balok informed Urbanski that he represented Maggese and that Maggese had agreed to testify against Mattison. Urbanski told Mattison about Balok's representation of Maggese at least as early as during his trial.[2] During trial before the same Chemung County Court judge who some months earlier had taken Maggese's plea, Mattison became upset when he saw Balok, whom he knew to be a member of Urbanski's firm, talking in the courtroom to a police investigator. Urbanski told Mattison that Balok had represented Maggese on unrelated charges, which apparently assuaged Mattison. No objection was made to Urbanski's continued representation, and the trial judge, unaware of the underlying facts, did not inform Mattison of any possible conflict of interest. Maggese, on direct, testified that he was serving a five-year sentence; in his brief cross examination of Maggese, Urbanski made no reference whatever to the plea, or the negotiated sentence, but simply asked that the court

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[2]The court by this finding implicitly rejected Mattison's testimony that he first learned of Balok's representation of Maggese in July 1980, nearly two years after his conviction, in the course of a conversation with Urbanski in which Urbanski allegedly expressed distaste for the fact that no plea bargain had ever been offered to Mattison whereas Balok had been "able to work out a very successful and comfortable deal for Maggese." On this appeal Mattison urges that by negotiating a plea for Maggese, Balok effectively precluded any similar arrangements for him.

take judicial notice of the maximum sentences for the crimes Maggese had committed. In summation Urbanski "speculat[ed]" that Maggese's reduced sentence possibly influenced his testimony.

At trial Maggese testified that Mattison obtained the gun, planned the robbery, created an alibi, and persuaded him to go along. Mattison, in his own defense, testified that Maggese was the instigator, that he (Mattison) had previously served as a police informant, that he was watching Maggese at the request of the State Police, that he could not alert authorities before the robbery, that he had accompanied Maggese intending to turn him in, and that he lacked intent to commit a robbery.[3] Mattison was found guilty of robbery in the first degree and sentenced to seven to 21 years in prison.

On November 14, 1978, the Appellate Division assigned Urbanski to represent Mattison on appeal. Ineffective assistance of counsel was not raised on appeal, and the conviction was affirmed.

In early 1983, Mattison made the present motion to vacate his conviction and for a new trial pursuant to CPL 440, in which he claimed that Balok, Miller and Urbanski, a firm of three lawyers, had a conflict of interest, and that he was denied effective assistance of counsel. Concluding that it was unable to resolve the questions raised on the papers, the court held a hearing at which several witnesses including Balok, Urbanski and Mattison testified. The court ultimately denied the motion, finding that no conflict existed, that Urbanski conducted a competent, effective and independent defense, and that by retaining Urbanski as counsel on appeal Mattison waived any ineffec-

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[3]Mattison was an acknowledged confidential police informant, and had in the past been paid for his services. At the 440 hearing Mattison testified that he had in fact furnished the police with information regarding several specific crimes, including crimes involving Maggese.

tive assistance claim. The Appellate Division unanimously affirmed without opinion, and a judge of this Court granted Mattison leave to appeal.

At the outset, we reject the People's contention that Mattison waived his ineffective assistance claim because Urbanski represented him on appeal. The People rely upon *People v. Gomberg* (38 NY2d 307, 316), in which we stated that the defendant must be deemed to have waived any claims arising out of his trial counsel's representation because he retained the same attorney on appeal. Here, however, Urbanski was assigned, not retained, as Mattison's appellate counsel. Moreover, in *Gomberg* the court had inquired prior to trial whether the joint representation would result in a conflict and advised that any defendant who felt there was a conflict could have other counsel. Thus, it was plain that defendants were aware of a potential conflict and of their right to new counsel. Here, Mattison knew that Balok, a partner at Urbanski's firm, had represented Maggese on unrelated charges. There is no evidence that he was aware that Balok's involvement included related charges, that joint representation in these circumstances might constitute a breach of professional ethics, or that it could furnish grounds for a new attorney or a new trial.

Joint representation of defendants is, of course, not in and of itself a conflict of interest or a denial of effective assistance of counsel (*People v. Gomberg,* 38 NY2d 307, 312). When jointly represented defendants proceed to trial together, a "conflict exists only when the individual defenses 'run afoul of each other' " (*id., quoting People v. Gonzalez,* 30 NY2d 28, 34, *cert denied* 409 US 859). Actual conflict between defendants "may be shown, for example, through the existence of 'pronounced variations in the type and quantum of evidence against each defendant [which suggests] different theories and tactics of defense

for each' " (*People v. Cruz,* 63 NY2d 848, 850, *quoting People v. Baffi,* 49 NY2d 820, 822). Once a conflict between codefendants at trial is established, prejudice is presumed, for "courts will not enter into 'nice calculations' as to the amount of prejudice resulting for the conflict" (*People v. Gomberg,* 38 NY2d 307, 312, *supra*).

In the interest of avoiding such conflicts, and because defendants may not always sense when a conflict exists or perceive how it might undermine effective representation, the trial judge "has a duty to protect the right of an accused to effective assistance of counsel" (*People v. Gomberg,* 38 NY2d 307, 313, *supra; People v. Macerola,* 47 NY2d 257, 263, *supra*). Before the trial begins, "it is the responsibility of the Trial Judge, independent of the attorney's obligation to inform his clients of any conflicting interests which may hinder his representation, to 'ascertain, on the record, whether each defendant [represented by the same attorney] has an awareness of the potential risks involved in that course and has knowingly chosen it' " (*People v. Macerola,* 47 NY2d 257, 263, *quoting People v. Gomberg,* 38 NY2d 307, 313-314, *supra*). A judge's failure to make the appropriate inquiry, when circumstances require it, may result in reversal of a conviction and a new trial. In *People v. Macerola* (47 NY2d 257), for example, a new trial was necessary where the judge had failed to make the appropriate inquiry, and each defendant's defense implicitly incriminated the other, placing their common counsel "in a very awkward position at trial" (47 NY2d at 264).

Macerola and *Gomberg* are of course distinguishable in that counsel there simultaneously represented at trial codefendants with competing interests, whereas here Maggese had struck his plea bargain during the period of common representation but before the commencement of Mattison's trial. But the principles articulated in those cases

govern this situation as well: to assure his right to effective assistance of counsel, defendant should have been independently informed of a conflicting interest on the part of Miller & Balok and the potential risks involved, so that he could intelligently choose whether to proceed with his attorney. Mattison was entitled to know of Balok's involvement with Maggese in this matter as he proceeded to trial in which, in furtherance of the plea bargain advocated by Balok, Maggese was a principal antagonist whose credibility and testimony had to be undermined.

A similar issue was presented in *People v. Lombardo* (61 NY2d 97), where defendant's attorney had previously represented the People's chief witness on unrelated charges. We concluded that the trial court's failure to conduct a *Gomberg* inquiry was error, but that reversal was not required because "defendant has not demonstrated 'that a conflict of interest, or at least the significant possibility thereof, did exist' " (*People v. Lombardo,* 61 NY2d 97, 103, *quoting People v. Macerola,* 47 NY2d 257, 264, *supra*). We conclude, as in *Lombardo,* that error occurred when Mattison was permitted to proceed to trial uninformed about the association of his retained counsel with Maggese. The clash between Maggese and Mattison, even if not previously apparent, was evident from the outset of the trial, as the defense was laid bare in opening statements and Maggese, the People's first witness, took the stand. Although the trial judge might not—as the lower courts found—have been aware of the underlying facts, the People knew that Maggese would be a principal witness against Mattison and that he had been represented by Balok. These facts should have been brought to the attention of the trial judge and appropriate inquiry made (*see, People v. Lombardo,* 61 NY2d at 102, *supra*).

Unlike *Lombardo,* however, reversal is required here. First, a plea by one defendant in exchange for testimony

against the other in the same matter is virtually certain to place lawyers involved in representing both in an untenable position (*see, People v. Dell,* 60 AD2d 18 [Hancock, J.]; *see also,* Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Tex L Rev 211, 273-274 [1982]; Tague, Multiple Representation of Targets and Witnesses During a Grand Jury Investigation, 17 Am Crim L Rev 301, 312 [1980]; R. Girgenti, Problems of Joint Representation of Defendants in a Criminal Case, 54 St. John's L Rev 55, 64-65 [1979]; Note, Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel, 58 Geo L J 369, 379 [1969]). Moreover, this case presents an actual rather than potential conflict.[4] The stories of Maggese and Mattison are in direct collision—indeed, as Urbanski testified, they were inconsistent in every respect—each pointing to the other as the major culprit while exonerating himself. Finally, notwithstanding Carmody's representation of Maggese on the robbery charge, Balok cannot be cast in the limited role of having formerly represented a prosecution witness on unrelated charges (*see, e.g., People v. Lombardo,* 61 NY2d 971, *supra*). It is apparent that Balok negotiated for Maggese on related as well as unrelated charges, at the same time his associate represented Mattison. All sides viewed Maggese's plea to the three indictments as a package. Thus, while advancing the plea bargain for Maggese, which Balok characterized as a "good plea" and "more than fair", Balok had an obvious interest that Maggese appear less culpable, which necessarily meant that Mattison had to appear more

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[4]We are not barred from reaching this conclusion, despite the trial court's undisturbed finding that there was no conflict, because it is a conclusion of law, not a finding of fact (*see, Cuyler v. Sullivan,* 446 US 335, 341).

culpable. Indeed, at the time the plea was taken Balok—lending personal force to the bargain he had negotiated—insisted the record reflect that Maggese in his presence had discussed his involvement and that of the co-defendants both in the burglary and in the robbery. The success of Mattison's defense, however, turned on convincing the jury that that very testimony was false, and concocted in Maggese's self-interest simply to reduce his sentence. Such a situation necessarily placed trial counsel in a very awkward position, where prejudice to Mattison need not be precisely delineated but must be presumed (*see, People v. Gomberg*, 38 NY2d 307, 312).

People v. Alicea (61 NY2d 23), on which the People rely, is not a case where any actual conflict was shown. At his trial Alicea testified that Torres had shot the victim. Torres, represented by the same attorney, had pleaded guilty three years earlier—indeed the plea was taken even before defendant's arrest—and absconded, and his whereabouts were unknown. We proceeded on the assumption that a potential conflict of interest existed but concluded that in these circumstances a showing of a possible or potential conflict, without more, was "insufficient to entitle defendant to a new trial; he must demonstrate that the conduct of his defense was in fact affected by the operation of the conflict" (61 NY2d at 31). Significantly, in *Alicea* the plea was not taken during the period of common representation and Torres did not testify against Alicea as a condition of his bargain.

Finally, the People emphasize that Urbanski handled Mattison's defense without help from Balok, who acted as assistant public defender, and that Urbanski as a personal matter had no divided loyalties. However, if Balok by virtue of his involvement with Maggese was precluded from representing Mattison in this matter, so was Urbanski. We have made clear that, "for the purpose of disqualification

of counsel, k nowledge of one member of a law firm will be imputed by i inference to all members of that law firm'' (*see, People v. Wilkins,* 28 NY2d 53, 56; *see also, Cardinale v. Gol linello,* 43 NY2d 288, *supra*). Given the clear conflict here, we are not called upon to decide whether a public defen der's office, or the law firm of a part-time assistant pul blic defender, must be disqualified from representing codefendants (*see, People v. Wilkins,* 28 NY2d 53, 56, *supra*).

In view of our decision, it is unnecessary to pass on Mattison's other arguments in support of reversal.

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to vacate the judgment of conviction granted, and the case remitted to Chemung County Court for a new trial.

Order reversed, defendant's motion to vacate the judgment of conviction granted, and case remitted to Chemung County Court for a new trial. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Meyer, Simons, Alexander, Titone and Hancock concur.

Decided June 5, 1986